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INTRODUCTION TO LEGAL THEORY

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Professor Jennifer Nedelsky

University of Toronto

Fall 1989

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INTRODUCTION TO LEGAL THEORY

PROFESSOR JENNIFER NEDELSKY

FALL 1989

This course is intended to introduce students to important debates in contemporary legal theory. The course is in part structured around the question of why legal theory has become so important, what are the dilemmas that have pushed every major law school in North America into debates over legal theory. The very meaning and nature of law is increasingly contested. We will examine those contests in both the arguments that are currently most pressing and in the earlier theories that have shaped the terms of contemporary debate. Students will be given an introduction to the basic issues in philosophy and political theory that have come to be a central part of legal theory, again with the emphasis on why these questions are important for an understanding of what law is, can, or should be.

The dominant mode of legal thought in the common law world consists of variants of liberal legal theory. We will, accordingly, spend several weeks on some of the most important debates among these variants. There have also been increasingly important challenges to liberalism as an adequate foundation for either legal or political theory. We will look at some of those challenges both in the literature about law and in the philosophical debates. We will always begin our inquiry with arguments about law as such. But it will quickly become apparent that the most important arguments about what law is or should be rest on deeper arguments about the nature of self and society and about how we know things. We will move back and forth between debates internal to liberal legal theory and challenges to this dominant theory, and also between legal theory and the more basic philosophical issues underlying these debates.

REQUIREMENTS:

This course is genuinely an introduction. It assumes no prior knowledge of legal theory or philosophy. I have selected the readings on the basis of their intrinsic interest, their representativeness or their influence on important debates, and their accessibility. None of the readings is simple, but each is accessible if read carefully. I have, accordingly, kept the total pages assigned to a moderate number. But it is essential that you read them closely and carefully. If you see there are only twenty pages assigned for a given class, please do not allot only twenty minutes for reading them. I have included the footnotes to all the articles because I think they provide a good sense of the academic context in which articles are written. They also provide a bibliographic guide to related materials. As such they are part of an introduction to legal theory. In general, however, you need not treat them as required reading (which further reduces the number of pages assigned).

Most of each class will be a discussion of the assigned reading. It will be extremely difficult, if not impossible to get anything out of the class if you have not done the reading.

Students will be required to write six one page "comments" on the readings. You will be assigned to three different weeks for which the "comments" are due. (If you are assigned to a week in which there is only one reading for both days, you may either write a separate comment for each day or one two page comment.) The "comments" are due at Noon in Rm 342, Flavelle on the day of the class.

READINGS:

All the readings are contained in the casebook on sale in the bookroom.

EVALUATION:

Six one-page comments (15%) AND

OPTION 1: 5 page midterm paper (25%) or 48-hour take-home due Monday, October 16 and final 10 page paper or 72 hour take-home (60%) due Noon, January 11 in room 342 Flavelle.

OR

OPTION 2: final 15 page paper or 72 hour take-home exam (85%) due Noon, January 9 in room 342 Flavelle.

There will be no penalty, as such, for exceeding the page limits for the papers. However, clarity and conciseness of the argument will be an important factor in the grading. A tightly argued paper will get a better grade than a long, diffuse one that takes twice as long to make the same points.

Late papers will be penalized one third of a grade if the paper is turned in one or two days late, two-thirds of a grade if it is 3 or 4 days late, a full grade if the paper is turned in on the fifth or sixth day after the deadline. Each day, including Saturday and Sunday, counts as one day. After the sixth day, law students will be referred to the Course Approval Committee if they need an additional extension.

WEEK 1. INTRODUCTION

WEEKS 2 and 3. We begin with a classic debate in which we see a liberal defense of individual freedom contrasted with an insistence that not just individual rights, but the nature of society must be taken into account when considering the proper scope of the law. The Hart-Devlin debate reveals some of the great strengths, as well as the weaknesses of liberal legal theory. It also provides an interesting comparison with the recurrence of

this debate as a central issue in contemporary criticisms of liberal legal and political theory (by critics who would feel relatively little affinity with Devlin). Catherine MacKinnon's essay, on the other hand, is an example of the ways that some contemporary critics try to fundamentally transform the way legal arguments have traditionally been conceived.

In reading these essays (and all the readings for this course) you should first try to understand what the author is trying to argue and to see what is valuable about it. Then you should contrast the opposing arguments and begin to form a judgement about which you find more useful and persuasive.

Tuesday; Devlin, Patrick, The Enforcement of Morals.

Toronto: Oxford University Press, 1965
Preface, Ch. 1. pp.1-25.

Thursday; Hart, H.L.A., Law, Liberty and Morality.

Stanford: Stanford University Press,
1966. pp.1-52.

Tuesday; Devlin, Patrick, The Enforcement of Morals.

Toronto: Oxford University Press, 1965.
Ch. VII, pp. 124-139.

Thursday; MacKinnon, Catharine A., "Not a Moral Issue," in
Feminism Unmodified: Discourses on Life and Law.

Cambridge: Harvard University
Press, 1987. pp. 146-162.

WEEK 4

Tuesday; Dworkin, Ronald, "Hard Cases" in Taking Rights Seriously.

Cambridge: Harvard University Press,
1978, pp. 81-130. (We will be spending
both classes on the essay, but you should
have read it all by Monday.)

Thursday; Dworkin, Ronald, "Hard Cases".

WEEKS 5 and 6. Critiques of liberal theory now constitute a sizeable academic industry in both legal and political theory. Liberal theory continues, however, to be dominant in both fields, as well as in the less self-conscious thought of politicians, lawyers, and judges. One of the reason defenders of liberal theory offer for being unmoved by the criticisms is that they don't see any real alternative offered by the critics. Liberal theory has, of course, been around and elaborated upon for several

centuries. It is not surprising that contemporary critics have not yet developed a full blown alternative. One of the most promising prospects for such an alternative is, however, provided by feminist theory. Here we have a glimpse at those prospects and a paper that explores some of the difficulties in substituting a popular feminist concept "an ethic of care" for the long standing basis for political and legal theory, an "ethic of justice." Notice the difference between Dworkin's presuppositions about the nature of law and legal theory and those of these authors.

WEEK 5

Tuesday; Scales, Ann C., "The Emergence of Feminist Jurisprudence: An Essay," 95 Yale Law Review (1986). pp. 1373-1403.

Thursday; Gilligan, Carol, In a Different Voice. Psychological Theory and Women's Development.

Cambridge: Harvard University Press, 1982.

"Reply to critics," Signs Volume 2, pp. 324-333.

Finley, Lucinda, "Silence"

WEEK 6

Tuesday; Tronto, Joan C., "Beyond Gender Difference to a Theory of Care" in Signs, Vol. 12, No. 4. (1987). pp. 644-663.

Thursday; MacKinnon, Catherine, "Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence," (conclusion) 8 Signs 635 (1982).

WEEK 7. We now move to a critique of the liberal tradition of legal thought. Gary Peller provides an example of the Critical Legal Studies attempt to challenge not just the particular conclusions of liberal legal thought, but its whole mode of analysis. Peller asks us to reconsider the way we think about law (and everything else). As you read, consider the nature of the challenge he poses to the theorists we have read so far. We will be returning to the rest of Peller's article later.

Tuesday and Thursday; Peller, Gary, "The Metaphysics of American Law". 73 California Law Review 1151 (1985). pp. 1159-1191.

Midterm paper for Option 1 due.

WEEK 8

Tuesday; Rawls, John, "A Well Ordered Society"

Thursday; Sandel, Michael, Introduction to Liberalism and its Critics pp. 1-12 and "Justice and the Good". pp. 159-176

WEEK 9

Tuesday; Galston, William, "Defending Liberalism," American Political Science Review 76 (1982): 621-29.

Thursday; Hayek, Friedrich A., "Introduction," pp. 1-7, and
"Nomos," pp. 94-122 in Law Legislation and Liberty.
Volume 1, Rules and Order.
Chicago: University of Chicago Press, 1973. pp. 1-123.

WEEK 10

Tuesday; Peller, pp. 1191-1219.

Thursday; Peller, Gary. pp. 1219-1259.

WEEK 11. So far we have seen a range of debates within and about liberal theory and its implication for the law. By now you have some sense of the basic assumptions (and disagreements over them) that underlie debates over the nature, function and possibilities of the law. It is time, therefore, to turn to perhaps the most important expositor of the conception of rights and the individual that underlies most of liberal theory: Kant. Kant's vision of the individual is that which is assumed by most liberal theory, and that which is the basic subject of attack by those who intend to challenge the foundations of liberal theory.

Tuesday; Kant, Foundations of the Metaphysics of Morals (selections, as edited by Alan Brudner). pp. 143-156

Thursday; Weinrib, Ernest J., "Law as a Kantian Idea of Reason" 87 Columbia Law Review, pp. 472-491 (excerpts).

WEEK 12. If Kant is the philosopher who provides the foundation for much of liberal theory, Hegel is one of the great thinkers who many critics of liberal theory see as providing an alternative foundation for political, moral and legal theory. Charles Taylor is one of the most important and lucid of the Hegel scholars.

Tuesday; Taylor, Charles, "Justice After Virtue"

Thursday; Taylor, "Justice After Virtue"

WEEK 13. We return now to contemporary legal theory. Peter Gabel's essay is a particularly interesting example of Critical Legal Scholars' efforts to understand law in a completely different way. His arguments will sound quite strange. Try to read the essay sympathetically, and I think you will find that it is comprehensible even though unfamiliar. When you first read it, don't worry about unfamiliar terms; just try to see what he's getting at. Try to participate with him in his efforts to rethink, reimagine what lies behind the concept of rights.

Tuesday; Gabel, Peter, "The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves".
Sections I-IV, pp. 1563-1586.

Thursday; Gabel, pp. 1586-1599

WEEK 14

Tuesday; White, James Boyd, "Law as Rhetoric" - 52 University of Chicago Law Review (1985). pp. 684-702.

Thursday; TBA